BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LINDA S. HENDERSON	)	
Claimant	)	
VS.	)	
	)	
EATON CORPORATION	)	Docket No. 1,032,322
Respondent	)	
AND	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent requests review of Administrative Law Judge Thomas Klein's April 26, 2013 preliminary hearing Order.

APPEARANCES

Scott J. Mann of Hutchinson, Kansas, appeared for claimant. P. Kelly Donley of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record on appeal is the same as that considered by Judge Klein and consists of the Agreed Award dated December 19, 2007, along with all attached exhibits, the transcript of the January 4, 2013 deposition of Pat Do, M.D., and exhibits thereto, the transcript of the March 13, 2013 preliminary hearing, and exhibits thereto, and the transcript of the April 2, 2013 continuation of preliminary hearing by deposition, in addition to all pleadings contained in the administrative file.

ISSUE

This is a post-award proceeding for medical benefits. Judge Klein ruled that claimant's March 8, 2006 accidental injury accelerated her need for a right total knee replacement.

Respondent argues that the proper issue concerns whether claimant's need for a right total knee replacement is the natural and probable consequence of her 2006 injury. Respondent argues claimant failed to prove that her need for a total knee replacement is the direct and natural consequence of her 2006 injury, and therefore, Judge Klein's preliminary hearing Order should be reversed. Claimant did not submit a brief.

The issue for review is: Is claimant's current need for a right total knee replacement either because the 2006 accidental injury accelerated her need for surgery or because the need for surgery is the direct and natural result of her 2006 injury or due to her ongoing osteoarthritis?

FINDINGS OF FACT

Claimant was a parts coordinator for respondent. She would use a forklift and gather materials for machinists. On March 8, 2006, she stepped off of a forklift and felt a pop in her right knee, followed by subsequent pain and swelling. She received treatment from Erik Severud, M.D., including a May 12, 2006 surgery consisting of diagnostic right knee arthroscopy with partial medial meniscectomy and chondroplasty. Dr. Severud evaluated claimant for right knee pain on February 6, 2007.

On December 19, 2007, the parties entered into an Agreed Award. Claimant was awarded a 7% permanent partial impairment to the right lower extremity and a 1% permanent partial impairment to the left lower extremity. Future medical benefits and review and modification were left open upon proper application to and approval by the Director of the Division of Workers Compensation. Claimant continued to work for respondent.

On May 17, 2011, claimant saw Dr. Severud for increased right knee pain for the past two or three months. Right knee x-rays showed moderate to severe degenerative changes. Physical examination revealed mild tenderness and pain in the right knee, with the left knee being asymptomatic. Claimant testified that Dr. Severud recommended a right total knee replacement. Dr. Severud noted:

> [Claimant's] symptoms are most likely due to the osteoarthritis of the knee. The patient had osteoarthritis at the time of the knee scope in 2006. The current findings and symptoms are consistent with the natural progression of osteoarthritis. Most likely [claimant] had osteoarthritis prior to the work related injury and the predominate reason for the present condition of the knee is the pre-existing osteoarthritis.[1]

Prior to May 17, 2011, Dr. Severud had not evaluated claimant since February 6, 2007. Before May 17, 2011, claimant did not seek medical attention for her right knee nor take any prescription medication since 2007. Claimant denied having any new injuries to the right knee, but testified that subsequent to her 2006 surgery, she continued to have problems with swelling and pain in her right knee, as well as trouble sleeping at night. She testified that walking, standing in one spot and squatting increased her symptoms. She indicated that while she experiences swelling in her left knee, it is not quite as bad as her right knee.

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[1] P.H. Trans., Ex. 4 at 3.

Claimant's last date of work was in June 2011. She retired on August 1, 2011.

On April 12, 2012, claimant was seen at her attorney's request by C. Reiff Brown, M.D., who opined that claimant suffered from bilateral degenerative joint disease which was rendered symptomatic on the right side by the work-related injury on March 8, 2006. Dr. Brown believed that had the March 8, 2006 injury not occurred to the right knee, claimant would have "just as good function of the right as she has in the left." Dr. Brown recommended a right total knee arthroplasty.

Claimant's attorney filed an application for post-award medical on May 3, 2012 and set a post-award medical hearing for May 22, 2012. On June 1, 2012, Judge Klein issued an Order for an independent medical evaluation with Pat Do, M.D., a board certified orthopedic surgeon, for his opinions on causation and recommended medical treatment.

Claimant was seen by Dr. Do on July 2, 2012. Dr. Do noted that claimant suffered from grade 3 chondromalacia of the medial femoral condyle at the time of her right knee arthroscopy on May 12, 2006. Grade 3 chondromalacia meant the weightbearing portion of claimant's right knee was almost worn down to the bone. Grade 4 chondromalacia means the weightbearing portion of a patient's right knee is worn down to the bone. At the time of his examination, Dr. Do indicated claimant's left knee was hurting as much as her right knee. He recommended viscosupplementation and a total knee arthroplasty for the right knee. In addressing causation, Dr. Do's report states:

> Within a reasonable degree of medical probability her need for right knee replacement is a natural and probable consequence of aging and not a natural and direct consequence of her work-related injury to her right knee on March 8, 2006.
>
> My rationale behind this is that even in May 2006 she was already almost worn down to bone on the weightbearing portion of her knee. Since 2007 her left knee has gotten progressively worse with what sounds like degenerative joint disease. I think a similar process for her right knee has been occurring ever since she was released at maximum medical improvement in November 2006 with no permanent work restrictions. I think her need for total knee replacement and need for treatment is more a natural and probable consequence of aging.[2]

Dr. Do testified on January 4, 2013. Dr. Do agreed with Dr. Severud that claimant's presentation was consistent with the natural progression of osteoarthritis. Dr. Do testified that he considered claimant's need for right total knee replacement to be more the consequence of claimant aging than the consequence of the 2006 accidental injury.[3]

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[2] P.H. Trans., Ex. 1 at 2-3; see also Do Depo. at 13-15.

[3] Do Depo. at 15.

Initially, Dr. Do testified that absent the 2006 injury, claimant "could" currently have the need for a total knee replacement.[4] He also noted that even absent the 2006 injury, claimant "probably" would currently need a right total knee replacement:

> Q. Okay. If she has the degenerative condition in both knees, how is it that the injury in 2006 could have accelerated her need for a total knee replacement?
>
> A. I'm going to say if you have an injury and then you have a surgery, we're not God, we can't make it necessarily better. I think that injury is going to have some part in it.
>
> Q. Is there any way to know whether she would have just needed the knee replacement at this point irregardless [sic] of that?
>
> A. She probably would have. The reason I say that is even in Dr. Severud's operative report in May, just a few months after her March, 2006, incident, she was almost worn down to bone anyway, so that's how I weigh the two situations together. And that was in May of 2006 that she was already almost worn down to bone.[5]

Dr. Do also testified that claimant's prior injury and surgery "definitely [did] not help things" and had played a role in her need for knee replacement surgery[6] and that claimant's 2006 injury accelerated her need for a right total knee replacement.[7]

PRINCIPLES OF LAW

The burden of proof is on claimant to establish her right to an award of compensation.[8] Post-award medical treatment can be awarded if the need for medical care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award.[9] An accidental injury is compensable even where the accident only aggravates or accelerates the condition.[10]

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[4] *Id.* at 10-11.

[5] *Id.* at 15-16; see also pp. 12-13.

[6] *Id.* at 15; see also pp. 10-11.

[7] *Id.* at 12-13.

[8] K.S.A. 2005 Supp. 44-501(a).

[9] K.S.A. 2005 Supp. 44-510k(a).

[10] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 514, 949 P.2d 1149 (1997).

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is compensable. In *Jackson*, the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.[11]

In *Logsdon*, the Kansas Court of Appeals noted:

> 1. WORKERS COMPENSATION–*Injury as Direct Result of Primary Injury–Question of Fact*. Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> 2. SAME–*Injury as Direct Result of Primary Injury–Subsequent Injury Compensable if Primary Injury Arose Out of and In Course of Employment.* When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
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> 3. SAME–*Aggravation of Primary Injury for Which Compensation Awarded–Compensation Allowed for Postaward Medical Benefits.* When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.[12]

Nance states, "The passage of time in and of itself is not a compensable injury. Thus, where the deterioration would have occurred absent the primary injury, it is not compensable. However, where the passage of time causes deterioration of a compensable injury, the resulting disability is compensable as a direct and natural result of the primary injury."[13] In *Nance*, "there was undisputed testimony that the primary injury had worsened, quite likely through the normal aging process and the passage of time. The worsening of a claimant's compensable injury, absent any intervening or secondary injury, is a natural consequence that flows from the injury. It is a direct and natural result of a primary injury. Since Nance's worsening back condition is merely a continuation of his original injury, causation is not an issue."[14]

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[11] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[12] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1, 2, 3, 128 P.3d 430 (2006).

[13] *Nance v. Harvey County*, 263 Kan. 542, 550, 952 P.2d 411 (1997).

[14] *Nance v. Harvey County*, 23 Kan. App. 2d 899, 909, 937 P.2d 1245, 1252, *aff'd*, 263 Kan. 542, 952 P.2d 411 (1997).

In *Nance*, the Kansas Supreme Court noted that even though the doctor who testified about Nance's condition did not directly or affirmatively state "that the deterioration of Nance's injury is a direct and natural consequence of the first injury," such conclusion was the "inevitable result of his testimony."[15]

Whether a condition is the direct and natural result of an original or primary injury is under the umbrella of the "arising out of and in the course of employment" issue, which the Board has jurisdiction to hear on an appeal from a preliminary hearing order.[16]

ANALYSIS

Because the parties elected to proceed to a preliminary hearing utilizing the procedure under K.S.A. 44-534a, instead of the preferred procedure for litigating post-award medical provided in K.S.A. 2005 Supp. 44-510k, this appeal is not an appeal from a final order. Accordingly, this appeal will be heard and decided by a single Board Member as permitted by K.S.A. 2005 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[17]

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[15] *Nance*, 263 Kan. at 553.

[16] See *Swinney v. First Group America, Inc.*, No. 1,056,939, 2013 WL 862047 (Kan. WCAB Feb. 22, 2013), & *Baty v. Woodhaven Care Center*, No. 1,047,549, 2010 WL 1445627 (Kan. WCAB Mar. 31, 2010).

[17] *Siler v. U.S.D. No. 512*, 45 Kan. App. 2d 586, 251 P.3d 92, 93 (2011), *rev. denied* 293 Kan. ___ (2012), and *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, 1150 (2008), allow the use of preliminary hearing procedure in post-award proceedings. Pursuant to K.S.A. 44-556, Board decisions stemming from preliminary hearing orders are not subject to judicial review.

The specific post-award medical statute, K.S.A. 44-510k, enacted on July 1, 2000, treats a judge's post-award medical order as a final decision that is subject to review by the full Board. The Board's decision is thereafter subject to judicial review under K.S.A. 44-556.

Bryant v. U.S.D. No. 259, 26 Kan. App. 2d 435, 992 P.2d 808 (1999), indicates that post-award preliminary hearing orders for medical treatment should be considered final, and thus subject to judicial review, where such order is subsequent to a final order and there is no indication that a full hearing will be scheduled. Page 880 of *Quandt* notes that the hearing in *Bryant* "ended the matter," there was no need for further hearings, and no disputed issues remained, such that the ruling was final and subject to judicial review.

Therefore, there are two approved methods to address post-award medical issues: (1) the post-award medical statute, K.S.A. 44-510k, and (2) the preliminary hearing statute, K.S.A. 44-534a. A ruling from the Board following a K.S.A. 44-510k proceeding is subject to judicial review, while a Board's ruling stemming from a K.S.A. 44-534a post-award proceeding is not subject to judicial review, under *Siler* and *Quandt*, but is subject to judicial review under *Bryant*, depending of whether the hearing was meant to result in a final order. The differing case law and alternate methodologies to pursue post-award medical benefits create obvious problems in terms of an aggrieved party obtaining judicial review.

Nance, to some degree, sets forth competing and judicially-created legal theories:

- A respondent is still responsible for a claimant's compensable knee disability despite the worsening of such claimant's condition due to the passage of time. *Nance* seems to indicate that a worsening of a compensable injury, due to the passage of time and without an intervening accidental injury, is itself a direct and natural result of the injury. This theory is in claimant's favor. Claimant's 2006 accidental injury was compensable. Claimant did not sustain any intervening accidental injuries.

- *Nance* also states that where the deterioration would have occurred absent the primary injury, it is not compensable. In this matter, Dr. Do agreed claimant would likely have needed a total knee replacement regardless of the 2006 injury. This legal theory is generally in respondent's favor.

Unfortunately, *Nance* does not provide clear guidance on how this Board Member should proceed.

Respondent's argument concerns whether the knee surgery is needed as a result of claimant's 2006 injury or due to aging and the natural progression of osteoarthritis. In a post-award medical proceeding, an award for additional medical treatment can be made if the trier of fact finds that the need for medical care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award.

Dr. Do also testified that the 2006 injury and prior surgery accelerated claimant's need for right total knee replacement surgery. While a very close call, this Board Member concludes that claimant's current need for right total knee replacement surgery is necessary to cure or relieve the effects of the 2006 accidental injury.

CONCLUSIONS

Having reviewed the evidentiary record, the stipulations of the parties, and the parties' briefs, this Board Member affirms Judge Klein's decision.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[18] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

[18] K.S.A. 44-534a.

AWARD

WHEREFORE, this Board Member affirms Administrative Law Judge Thomas Klein's April 26, 2013 preliminary hearing Order.

IT IS SO ORDERED.

Dated this _____ day of July, 2013.

_____
BOARD MEMBER

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